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preemptive right. The Model Business Corporation Act § 24 on Shareholders' Preemptive Rights may well serve as their guide.³²

JERRY M. MURRAY

A REVIEW OF PRESENT LAW ON THE ADMISSION OF ILLEGALLY OBTAINED EVIDENCE IN OUR STATE AND FEDERAL COURTS

I. INTRODUCTION

There exists today, among state and federal courts, a divergence of opinion as to the admissibility of evidence illegally¹ obtained by state and federal officials.

Illegally obtained evidence which is admissible in certain state courts is inadmissible in others, and in our federal courts. Yet, evidence which is inadmissible in a state court sometimes may be admissible in a federal prosecution. The object of this article is to review the status of the law as it now stands.

II. ADMISSIBILITY IN FEDERAL COURTS OF EVIDENCE ILLEGALLY OBTAINED BY FEDERAL OFFICERS

It is a well-settled general rule today that evidence illegally obtained by federal officers is inadmissible in the federal courts.² This so-called "Exclusionary Rule" excludes any evidence obtained by unlawful search, and also the oral evidence concerning what was found or seized while the unlawful search was being conducted, together with the evidence developed as a result.

There are different theoretical bases for the exclusion in federal courts of illegally obtained evidence. Some courts appear to rely directly on the Fourth Amendment to the Constitution.³ Other courts take the position

32. Model Business Corporation Act, American Law Institute § 24 (1953). "The preemptive right of a shareholder to acquire unissued or treasury shares of a corporation may be limited or denied to the extent provided in the articles of incorporation.

Unless otherwise provided by its articles of incorporation, any corporation may issue and sell its shares to its officers or employees or to the officers or employees of any subsidiary corporation without first offering such shares to its shareholders, for such consideration and upon such terms and conditions as shall be approved by the holders of two-thirds of all shares entitled to vote thereon or by its board of directors pursuant to like approval of the shareholders." See also, § 53, clause p, for the right to amend articles to "limit, deny, or grant" preemptive rights.

1. "Illegal" is used in this article to include any act prohibited by the federal or state constitutions or any state or federal statutes.

2. *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1888); *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877 (1877); *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

3. *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951); a review of the history of the Fourth Amendment will show that the founders of our nation felt very strongly about the English practice of searching by writs of assistance. For a discussion of the history of the Fourth Amendment, see *Boyd v. United States*, supra note 2.

that the introduction of such evidence amounts to a violation of the Fifth Amendment. In *Agnello v. United States* the court put it this way:

It is well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment.⁴

In *United States v. Wong Quong Wong*⁵ the court relied on both the Fourth and Fifth Amendments and held that these amendments protect persons not only from self-incrimination and in this case the unreasonable search and seizure of their private papers, but also against the use of such unlawfully seized papers as evidence against them when a forfeiture of property is involved. In *Wolf v. Colorado*⁶ Mr. Justice Black, in concurring, interprets the opinion of the majority as saying:

The federal exclusionary rule is *not* a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate. (emphasis added)⁷

Whatever the real basis, the rule stands today, the only question in the federal courts being, (1) was it obtained illegally, and if so, (2) was the evidence obtained by or with the connivance of a federal officer?

(1) In determining whether the evidence was illegally obtained, the actions of law enforcement officials may be grouped under the following broad headings: (a) Illegal search and seizure, (b) Evidence obtained through coercion and unlawful detention, and (c) Information obtained through wiretapping. These headings are not all-inclusive, but a complete discussion would necessitate a work beyond the scope of this note. Each of these headings will now be discussed.

(a) *Search and Seizure*

In this area, the federal courts will admit evidence when secured through a valid search warrant or pursuant to a lawful arrest.⁸ A wide variety of facts and circumstances are constantly being brought before the courts for a determination of whether the evidence offered has been obtained through lawful search and seizure. In *Grau v. United States*⁹ the petitioner was convicted of unlawfully manufacturing whiskey. Articles offered in evidence at the trial were obtained through a search warrant. The warrant was found to be void for failure to observe statutory requirements. The Court ruled that for this reason the admission of the articles seized under this warrant as evidence was error, and reversed the judgment. In another instance the defendant was under surveillance for two months prior to the time officers entered his room without a search war-

4. 269 U.S. 20, 33, 46 S.Ct. 4, 70 L.Ed. 145 (1925).

5. 94 Fed. 832 (D. Vt. 1899).

6. 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949).

7. *Ibid* at 39, 40.

8. *Rabinowitz v. United States*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950); 82 A.L.R. 783.

9. 287 U.S. 124, 53 S.Ct. 38, 77 L.Ed. 212 (1932).

rant. In this case the officers looked through a transom from the hallway of a rooming house and observed the defendant engaged in operating a lottery. Here again, since the entrance to the building and to the room was made without an authorized search warrant, the evidence seized was held to be inadmissible.¹⁰ In *United States v. Sipes*,¹¹ federal officers saw the defendant, who had a reputation of being a bootlegger, walking on the street wearing a bulging jacket. Based only on these two facts, the officers searched the defendant without a warrant. The court held that the arrest was illegal and that the evidence thus obtained was inadmissible. In *United States v. Rosenthal*¹² alcohol tax agents made a search and seizure without a warrant. The court suppressed the evidence because there was no showing that there was probable cause for believing an offense had been committed by the defendant, hence his arrest was illegal.

In one situation, officers detected the odor of burning opium coming from a hotel room. They entered without a search warrant, arrested the only occupant, searched the room, and found opium. The court held there were no exceptional circumstances here sufficient to justify the failure of the officers to obtain a search warrant and that therefore the search violated the Fourth Amendment and the conviction based on evidence thus obtained could not be sustained.¹³

A comparatively new development in the law of search and seizure has been the taking of substances or fluids of the body without the person's consent. Formerly, the exclusionary rule seemed limited to oral or extrinsic evidence only, in a case such as *Rochin v. California*.¹⁴ In discussing body examination the court, in *Holt v. United States* said ". . . the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."¹⁵ The court of appeals of the District of Columbia held an enlisted man may be ordered by his superiors to submit to a physical examination for the purpose of ascertaining the presence of blood on his body.¹⁶

When the body is actually invaded, the problem is more complicated. In *United States v. Wills*,¹⁷ stomach pumping, participated in by a federal officer, constituted an unreasonable search and seizure. Although the court strongly condemned the forcible use of a stomach pump in *Re Guzzardi*,¹⁸ saying, in effect, the approval of such methods would mean a

10. *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

11. 132 F.Supp. 537 (U.S.D.C. Tenn. 1955).

12. 116 F.Supp. 873.

13. *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

14. 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

15. 218 U.S. 245, 252, 31 S.Ct. 2, 654 L.Ed. 1021 (1910).

16. *United States v. McFarland*, 150 F.2d 593, 80 App.D.C. 196 (1945).

17. 85 F.Supp. 745 (D.C.S.D. Cal. 1949).

18. 84 F.Supp. 294 (D.C. Tex. 1949).

return to trial by ordeal, they nevertheless sustained the conviction because it was shown there had been no participation by a federal officer until after the evidence in question had been recovered.

There is some recent authority that not all use of the accused's body as a source of incriminating evidence will be regarded as an unreasonable search and seizure even under the federal rule. In *Novak v. District of Columbia*,¹⁹ a urine specimen, obtained from a person for the purpose of an analysis for alcohol content, was held not to amount to an unlawful search and seizure. It was shown that the officer did not inform the defendant of his right to refuse, but the court pointed out that the defendant had been legally arrested and was being legally detained when the specimen was taken. In *Blackford v. United States*²⁰ the defendant was stopped at the international boundary line in California by Customs Officials. He was asked to remove his coat, whereupon puncture marks were revealed in the veins of his arms. The inspectors then directed the defendant to disrobe entirely, and upon his so doing, noticed a large quantity of a greasy substance about his rectum. The defendant admitted that he had heroin concealed in his rectum. He was then placed under arrest and taken to a United States Naval hospital, where, despite his denial and protest, the heroin was forcibly removed by medical personnel. The court held that the search and seizure did not constitute a violation of the Fourth and Fifth Amendments and did not fall under the "Rochin Rule" as a denial of due process.

(b) *Evidence Obtained Through Coercion and Unlawful Detention*

The test for the admissibility of a confession is whether it was made freely, voluntarily, and without compulsion or inducement of any sort.²¹ In *Joseph v. United States*,²² the mere fact that a confession was obtained before the defendant was taken before a commissioner was held not determinative of its admissibility. The court said the defendant must show that the confession was involuntary. However, in *Mallory v. United States*,²³ the petitioner was arrested early one afternoon and not taken before a magistrate until the next morning. During this time he was interrogated, submitted to a lie detector test, and in the evening made a confession, seven and one-half hours after his arrest. The court held this was a violation of Rule 5 (a) of the Federal Rules of Criminal Procedure, which requires that an arrested person be taken before a committing magistrate "without unnecessary delay," and the conviction of rape in the Federal District Court was reversed. In *Brown v. United States*²⁴ the confessions were allegedly obtained before prompt arraignment, but the court reasoned

19. 160 F.2d 588, 80 App.D.C. 95 (Mun. Ct. App.D.C. 1946).

20. 247 F.2d 745 (9th Cir. 1957) Cert. denied, 356 U.S. 914 (1958).

21. *United States v. Echleles*, 22 F.2d 144 (7th Cir. 1955).

22. 239 F.2d 524 (5th Cir. 1957).

23. 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 479 (1957).

24. 228 F.2d 286 (5th Cir. 1955).

that because the allegedly unlawful detention was by state officers not acting in collaboration with federal officers, the confession was admissible.

(c) *Wiretapping*²⁵

Wiretapping is a comparative newcomer to the field of search and seizure. Prior to the passage of the Communications Act of 1934,²⁶ the majority view that the search and seizure provisions of the Fourth Amendment prohibited the taking of tangible things, and did not preclude testimony concerning voluntary conversations secretly overhead.²⁷ Wiretapping is not a search and seizure in contravention of the Fourth Amendment, and evidence received by this means would be admissible in the federal courts were it not for the passage of Section 605.²⁸ The Supreme Court, however, apparently has taken the view that if the premises were unlawfully invaded in order to accomplish the wiretap, it would be inadmissible in the federal courts without the application of Section 605.²⁹ In *Nardone v. United States*³⁰ the Supreme Court decided that Section 605 of the Federal Communications Act of 1934 applied to federal officers as well as other persons and rendered such evidence inadmissible in a criminal trial. On the second appeal of the *Nardone* case, the court held that Section 605 rendered inadmissible not only evidence of the conversations heard by wiretapping but also evidence procured or made accessible by the use of that information.

A limitation upon the effect of Section 605 was imposed by *Goldstein v. United States*³¹ where it was held that one not a party to the intercepted conversation has no standing to object to it being introduced in evidence.

In cases in which there has been no interference with a communication facility, the courts have held there is no violation of Section 605 or the Fourth Amendment.³²

(2) In determining whether the evidence was "obtained" by a federal officer, the courts have used such criteria as instigation by federal officers,³³ or co-operation by federal officers in the search.³⁴ This has been generalized to whether a federal officer had "a hand in it."³⁵ In *Lustiz v. United*

25. Wiretapping as used in this article is a mechanical interception, somewhere between the point of transmission and the point of reception.

26. Act of June 19, 1934, c. 652, 48 Stat. 1103, 47 U.S.C. § 605 reads in part as follows: ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the meaning of such intercepted communication to any person. . . ."

27. Note, 7 Wyo. L.J. 89, 91 (1953).

28. *United States v. Coplan*, 88 F.Supp. 921 (1950).

29. *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942); see *Irving v. United States*, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561 (1954).

30. 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314 (1937).

31. 316 U.S. 114, 62 S.Ct. 1000, 86 L.Ed. 1312 (1942).

32. *Goldman v. United States and Shulman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942).

33. *Gambino v. United States*, 275 U.S. 310, 48 S.Ct. 137, 72 L.Ed. 293 (1927).

34. *Byars v. United States*, 273 U.S. 28, 47 S.Ct. 248, 249, 71 L.Ed. 520 (1927).

35. *Ibid.*

States,³⁶ a federal officer who helped in "sifting" the evidence, even though he was not present when the room was entered, constituted having a "hand in it" under the rule of the *Byars*³⁷ case. If there is an agreement that local officers are to make the unlawful search and seizure of evidence to be used by the federal officers, the evidence obtained may be excluded.³⁸

In *Flagg v. United States*³⁹ the court found instigation by federal officers simply because the plan was too elaborate and carefully prepared to be attributed to a few local law enforcement officers.

III. ADMISSIBILITY IN FEDERAL COURTS OF EVIDENCE ILLEGALLY OBTAINED BY STATE OFFICERS

It can be generally stated that evidence which has been obtained by state officers will be admitted in a federal court notwithstanding the fact that it would have been illegal by federal standards, if there has been no showing of federal instigation or participation,⁴⁰ and even though such evidence would be inadmissible in the state court. This is based on the holding that the Fourth Amendment has no application to state process.⁴¹ Thus, it follows naturally that if the unreasonable search and seizure by a state officer does not violate the Fourth Amendment, the evidence thereby gained also does not.⁴²

It has been stated that such an exception induces police lawlessness by encouraging federal officers to employ state officers to make illegal search and seizures so that the federal exclusionary rule may be circumvented.⁴³ How much of this is done is speculative, but it is carried on to a considerable extent.⁴⁴ There are many areas where state and federal crimes overlap, such as interstate transportation of stolen goods, or vehicles,⁴⁵ interstate white slave traffic,⁴⁶ possession or sale of narcotics⁴⁷ and others. In our modern-day law enforcement, much co-operation does and should exist, but the courts seemingly have drawn fine lines as to the admissibility of such evidence.

As stated earlier, the court in the *Flagg*⁴⁸ case inferred co-operation

36. 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949).

37. *Supra* note 34.

38. *United States v. Haywood*, 208 F.2d 156 (1953).

39. 233 Fed. 481 (2d Cir. 1916).

40. *Weeks v. United States*, *supra* note 105; see *Lustig v. United States*, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949).

41. *Smith v. Maryland*, 18 How. 71, 15 L.Ed. 269 (1855).

42. *Supra* note 40.

43. Note, 42 Minn. L. Rev. 121-122 (1957).

44. "In dozens of cases in my own experience as a Federal prosecutor we had to rely on the evidence procured by the unhampered police of the State of New York or important criminals would have gone free." Statement by Thomas E. Dewey, in 1 New York Constitutional Convention, Revised Records 372 (1938), as quoted in 58 Yale L.J. 144, 159, footnote 69.

45. Act of June 25, 1948, c. 645, § 1, 62 Stat. 806, 18 U.S.C. § 2312.

46. Act of June 25, 1948, c. 645, § 1, 62 Stat. 812, 18 U.S.C. §§ 2412-24, as amended May 24, 1949, c. 139, § 47, 63 Stat. 96.

47. Act of Feb. 9, 1909, c. 100, § 2(c), 35 Stat. 614 (1909), as amended 21 U.S.C. §§ 173-4 (1952), as amended 21 U.S.C. § 174 (Supp. 1956).

48. *Supra* note 39.

because of the elaborate and carefully prepared plan of search. *Shurman v. United States*⁴⁹ represents the opposite extreme. Here the court found that no co-operation existed, although the evidence revealed the passing on from the federal officer to the state officer of the information leading to the unlawful search, a second search by the federal officer some four hours after the search by the state officer, frequent exchange of information between state and federal officers, and the turning over of the case to the federal authorities after the search.⁵⁰ In *Burdeau v. McDowell*⁵¹ private admissible persons stole incriminating papers and delivered them to the federal authorities. It was held this evidence was admissible and that there was no violation of constitutional provisions, since whatever wrong was done was that of individuals taking the property of another. Thus the phrase "illegally obtained" is to be interpreted as "illegally obtained by law enforcement officers."

It would seem that a state official, stymied in a given case, could simply violate the law by making an unlawful search, and then turn the evidence over to the federal courts for prosecution. Such a solution is limited somewhat by the holding in *Gambino v. United States*⁵² that where the search is entirely by state officials, but made solely for the purpose of aiding the federal officers, the evidence is inadmissible. The *Flagg* case also acts as a brake on such a scheme.

IV. ADMISSIBILITY IN STATE COURTS OF EVIDENCE ILLEGALLY OBTAINED BY FEDERAL OFFICERS

There is a difference of opinion in the state courts as to whether the exclusionary rule keeps out evidence obtained by an unlawful search made solely by a federal officer, in a criminal prosecution in a state court. Among the states which admit this evidence are Montana,⁵³ North Dakota,⁵⁴ and Tennessee.⁵⁵ Against this view are lined Idaho,⁵⁶ Kentucky,⁵⁷ Mississippi,⁵⁸ Missouri,⁵⁹ Texas,⁶⁰ and Wyoming.⁶¹ In the Wyoming case, the court pointed out that the duty of the state court (as it is in the federal

49. 219 F.2d 282, cert. denied, 349 U.S. 921, 75 S.Ct. 661, 99 L.Ed. 1253 (C.A. 5th Tex. 1955).

50. But see *Lowrey v. United States*, 128 F.2d 477 (C.C.A. 8th 1942), where it appeared that there was a long-continued and invariably followed practice among state and federal officers in illicit liquor cases to tender such cases to the federal officer for prosecution under the federal law if the case was of sufficient importance. The fact that the evidence was illegally obtained by state officials would not prevent its exclusion even though there was no agreement under which the state officers made the arrests on behalf of the federal officers, and that the arrest in the particular case was made before the federal officers were advised of it.

51. 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1920).

52. 275 U.S. 310, 48 S.Ct. 137, 72 L.Ed. 293 (1927).

53. *State v. Gardner*, 77 Mont. 8, 249 Pac. 574 (1926).

54. See *State v. Lacy*, 55 N.D. 83, 212 N.W. 442 (1927).

55. *Johnson v. State*, 155 Tenn. 628, 299 S.W. 800 (1927).

56. *State v. Arregui*, 44 Idaho 43, 254 Pac. 788 (1927).

57. *Walters v. Commonwealth*, 199 Ky. 182, 250 S.W. 839 (1923).

58. *Lettle v. State*, 171 Miss. 818, 159 So. 103 (1935).

59. *State v. Rebasti*, 306 Mo. 336, 267 S.W. 858 (1924).

60. See *Ramirez v. State*, 123 Tex. Crim. 334, 58 S.W.2d 829 (1933).

61. *State v. Hiteshew*, 42 Wyo. 147, 292 Pac. 2 (1930).

court) is to uphold the provisions of the Fourth Amendment, and that if the evidence has been seized unlawfully, and for that reason cannot be admitted into the federal courts, it cannot be transformed into lawful evidence by being introduced in a state court.

In the Montana decision⁶² admitting such evidence, a federal officer discovered morphine in a package in the mail. He notified a state officer who, without a warrant, arrested the persons calling for the package. The court held the package was admissible as evidence since the violation, if any, had already occurred without the knowledge or co-operation of the sheriff. In this respect their reasoning was analogous to that of the federal courts when evidence had been obtained by persons other than federal officers.

The holding favoring the admissibility of such evidence may have much less significance since the decision of the United States Supreme Court in *Rea v. United States*.⁶³ Here, the Supreme Court in a five-to-four decision held that a federal court should enjoin a federal officer from testifying in a state case concerning evidence he had obtained through an invalid search warrant. This may logically be extended to all types of evidence obtained unlawfully, and if extended would prohibit the producing of such evidence by federal officers in any jurisdiction, regardless of the rule followed in that particular jurisdiction. The trend suggested by the *Rea* decision is undoubtedly in this direction.

V. ADMISSIBILITY IN STATE COURTS OF EVIDENCE ILLEGALLY OBTAINED BY STATE OFFICERS

When the federal exclusionary rule was definitely adopted, several states followed it immediately. Much of this was undoubtedly due to the number of liquor cases being tried in the courts of the nation. It may be surmised that because the Prohibition Act was so unpopular, state courts were disposed to take a lenient view of evidence gained in an "unreasonable search."

Within a few years after the adoption of the exclusionary rule by the United States Supreme Court, 13 states, including Wyoming, had followed its lead.⁶⁴ In support of the rule, the Wyoming court in 1920 states ". . . it has been generally held by the latest and best reasoned authorities."⁶⁵

However, all states were not in favor of keeping out this type of evidence. Many states lined up in opposition to the exclusionary rule. As one court put it, "an orthodox principle of the common law is that the admissibility of evidence depends upon its probative value and not

62. *Supra* note 53.

63. 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233 (1956).

64. Fla., Ill., Ind., Ky., Mich., Miss., Mo., Mont., Okla., Tenn., W. Va., Wis., and Wyo. 32 A.L.R. 412 (1934).

65. *State v. Peterson*, 27 Wyo. 185, 217, 194 Pac. 342, 351 (1920).

upon the method of its procurement."⁶⁶ The Supreme Court gave the states the "green light" to use evidence gained in such a manner in *Wolf v. Colorado*,⁶⁷ the only limitation being set out in *Rochin v. California*⁶⁸ that it is not admissible if obtained by "conduct that shocks the conscience."⁶⁹

All jurisdictions, state and federal, are limited by the due process of law clause of the Fourteenth Amendment and must for that reason reject confessions made under inducement or duress.⁷⁰

The states which follow the view of federal courts that illegally seized evidence is inadmissible are California, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming.⁷¹ Those states which admit illegally obtained evidence are Alabama, Arizona, Arkansas, Colorado, Connecticut, Georgia, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, and Virginia.⁷² The courts in these

66. 26 U. of Cinn. L. Rev. 521, see Ray, Restrictions on the Use of Illegally Obtained Evidence, 9 S.W. L.J. 434 (1955).

67. 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949).

68. 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

69. *Ibid* at 172.

70. *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); *Lisenba v. Calif.*, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941); *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935).

71. *People v. Martin*, 45 C.2d 755, 290 P.2d 855 (1955); *Richards v. State*, 45 Del. 573, 77 A.2d 199 (1950); *Weiner v. Kelly*, 32 So.2d 155 (1955 Fla.); *State v. Conner*, 59 Idaho 695, 89 P.2d 197 (1939); *People v. Castree*, 311 Ill. 392, 143 N.E. 112 (1924); *Callender v. State*, 136 N.E. 10 (1922 Ind.), mod. on reh. 193 Ind. 91, 138 N.E. 817; *Parrot v. Commonwealth*, 287 S.W.2d 440 (1956 Ky.); see, *People v. Bissonete*, 327 Mich. 349, 42 N.W.2d 113 (1950); *Tucker v. State*, 128 Miss. 211, 90 So. 845 (1922); *State v. Hunt*, — Mo. —, 280 S.W.2d 37 (1955); *State v. Gardner*, 74 Mont. 377, 240 Pac. 984 (1925); *State v. Ferguson*, 238 N.C. 656, 78 S.E.2d 911 (1953); *Humphries v. State*, 94 Okla. Crim. 319, 235 P.2d 975 (1951); *State v. Laundry*, 103 Ore. 443, 204 Pac. 958 (1922); *State v. Gooder*, 57 S.D. 619, 234 N.W. 610 (1931); *Allen v. State*, 161 Tenn. 71, 29 S.W.2d 247 (1930); *Tarwater v. State*, 160 Tex. Crim. 59, 265 S.W.2d 410 (1954); *State v. Cyr*, 40 Wash.2d 840, 246 P.2d 480 (1952); *State v. Lacy*, 118 W. Va. 343, 190 S.E. 344 (1937); *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923); *State v. George*, 32 Wyo. 223, 231 Pac. 683 (1924).

72. *Shields v. State*, 104 Ala. 35, 16 So. 85 (1893); *State v. Thomas*, 78 Ariz. 52, 275 P.2d 408 (1954); see *Lane, Smith & Barg v. State*, 217 Ark. 114, 229 S.W.2d 43, reh. denied, 217 Ark. 428, 230 S.W.2d 480 (1950); *Wolf v. People*, 117 Colo. 279, 187 P.2d 926 (1947) *aff'd*, 338 U.S. 25, 91, 69 S.Ct. 1359, 91 L.Ed. 1782; *State v. Zukauskas*, 132 Conn. 450, 45 A.2d 289 (1945); *Sideh v. State*, 91 Ga. App. 387, 85 S.E.2d 610 (1955); *State ex. rel. Kuble v. Bisignano*, 238 Iowa 1060, 28 N.W.2d 504 (1947); *State v. Kelley*, 125 Kan. 805, 265 Pac. 1109 (1928); *State v. Masticovo*, 221 La. 312, 59 So.2d 403 (1952); *State v. Schoppe*, 113 Me. 10, 92 Atl. 867 (1915); *Barker v. Warden*, 208 Md. 662, 119 A.2d 710 (1956); *Commonwealth v. Mercier*, 257 Mass. 353, 153 N.E. 834 (1926); *State v. Siporen*, 215 Minn. 438, 10 N.W.2d 353 (1943); *Billings v. State*, 109 Neb. 596, 191 N.W. 721 (1923); *Terrano v. State*, 59 Nev. 247, 91 P.2d 67 (1939); *State v. Mara*, 96 N.H. 463, 78 A.2d 922 (1951); *State v. Lyons*, 99 N.J.L. 301, 122 Atl. 758 (1923); *State v. Bell*, 35 N.M. 96, 290 Pac. 739 (1930); *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, cert. denied, 270 U.S. 657, 70 L.Ed. 784, 46 S.Ct. 353 (1926); *State v. Fahn*, 53 N.D. 203, 205 N.W. 67 (1925); *Browning v. Cleveland*, 126 Ohio St. 285, 185 N.E. 55 (1933); *Commonwealth*

states have used different theories for adopting the common law view of admissibility. The philosophy of the common law rule is well stated in *Davis v. State*, where the Maryland court said:

The question of how evidence is obtained is collateral to issue or guilt or innocence of the accused, and therefore pertinent evidence no matter how obtained, will be admitted. . . .⁷³

In a few states, the common law rule of admissibility has been modified by statute. For example, in Alabama the common law rule has been modified to provide that where the unlawful search is of a private dwelling for prohibited liquors the evidence thereby gained is inadmissible.⁷⁴ In Maryland the common law rule applies only to felonies. In that state a statute commonly known as the Bouse Act makes evidence obtained by means of an unlawful search and seizure inadmissible in the trial of certain misdemeanors.⁷⁵ However, the act specifically excepts a prosecution for the violation of the narcotics laws, and this exception has been upheld.⁷⁶

Among the states that follow the federal exclusionary rule, there are differences in the method of applying it. In Illinois the rule is applied only to evidence obtained by state officers acting under color of authority from the state.⁷⁷ Some states hold that if the evidence has been unlawfully obtained by officers of another state, it will be admissible against the accused.⁷⁸ This is reminiscent of the federal attitude. In Texas, if the accused testifies in his own behalf, and admits possession of the articles, their introduction is not reversible error⁷⁹ even though they were illegally obtained.

As to the general admissibility of evidence obtained by state officers in state courts, we can again use the broad headings mentioned before in connection with the federal courts.

(a) *Search and Seizure*

As in the federal courts, the states which follow the federal rule allow evidence if it has been obtained incident to a lawful arrest or seized under a valid search warrant. Some of these states are liberal in their construction of what constitutes a valid search. For example, in Idaho, a state which follows the federal rule, officers possessed a search warrant charging the defendant with an abortion offense. They entered the

v. Tunstall, 178 Pa.Super. 359, 115 A.2d 914 (1955); *State v. Olynik*, 83 R.I. 31, 113 A.2d 123 (1955); *State v. Addy*, 210 S.C. 353, 42 S.E.2d 585 (1947), (But in *Blacksburg v. Beam*, 104 S.C. 146, the opposite rule was followed, and never has been expressly overruled or distinguished); *State v. Aime*, 62 Utah 476, 220 Pac. 704 (1923); *State v. O'Brien*, 106 Vt. 97, 170 Atl. 98 (1934); and *Hall v. Commonwealth*, 138 Va. 727, 121 S.E. 154 (1924).

73. 57 A.2d 289, 289, 189 Md. 640 (1948).

74. 50 A.L.R.2d 536, footnote No. 5 (1956).

75. *Frank v. State*, 189 Md. 591, 56 A.2d 810 (1948).

76. *Barr v. Warden, House of Correction*, 202 Md. 643, 96 A.2d 494 (1953), cert. denied, 346 U.S. 839, 74 S.Ct. 62, 98 L.Ed. 360.

77. 361 Ill. 332, 197 N.E. 849 (1935).

78. *Kaufman v. State*, 189 Tenn. 315, 225 S.W.2d 75 (1949).

79. *Hill v. State*, 152 Tex.Cr.R. 248, 212 S.W.2d 143 (1948).

premises of the defendant while she was in the process of, or had just completed another abortion, for which she was later tried. It was held that the evidence seized under the search warrant was admissible against the defendant even though the search warrant in fact referred to a prior offense.⁸⁰

The problem of search by an invasion of the body has received more attention in the state than in the federal courts. In general, the numerical weight of authority has been that evidence obtained by compulsory physical examinations or tests should be admitted, and that such admittance does not deprive the accused of any constitutional right.

For example, in *State v. Cram*,⁸¹ the defendant was accused of manslaughter in driving while intoxicated. A blood sample was taken from the accused, after his arrest and while he was unconscious. It was held that there was no violation of the constitutional guarantee against self-incrimination by the introduction into evidence of testimony as to the presence of alcohol in the blood. Similarly, the privilege against self-incrimination has been held not to be violated by the admission into court of evidence of blood tests,⁸² urinalysis,⁸³ breath tests,⁸⁴ fingernail scrapings,⁸⁵ or the results of compulsory mental examinations.⁸⁶

There is authority to the contrary. In *State v. Weltha*,⁸⁷ a blood specimen obtained while the defendant was unconscious, but before any arrest, was held to be an illegal search and seizure.

The majority of decisions in this field do not rely on unlawful or unreasonable search and seizure as a basis for objecting to this type of evidence. As may be noted from the preceding cases, the most frequent objection is that it violates the privilege against self-incrimination and that this privilege should include tests made upon a person's body against his will, and not be limited to written or oral testimony.⁸⁸

(b) *Evidence Obtained Through Coercion and Unlawful Detention*

As in the federal courts, even a slight inducement held out to a person charged with a crime renders any confession obtained involuntary. Some examples of statements made which have been held to be an inducement sufficient to exclude a confession are given in *Bram v. United States*,⁸⁹ and quoted in *State v. Crank*⁹⁰ as follows:

80. *State v. Proud*, 74 Idaho 429, 262 P.2d 1016 (1953).

81. _____ Ore. _____, 160 P.2d 283 (1945).

82. *People v. Tucker*, 88 Cal.App.2d 333, 198 P.2d 941 (1948).

83. *Toms v. State*, 95 Okla. Crim. 60, 239 P.2d 812, 816 (1952).

84. *Ibid.*

85. *Coleman v. State*, 151 Tex. Crim. 582, 209 S.W.2d 925 (1948).

86. *Hunt v. State*, 248 Ala. 217, 27 So.2d 186 (1946).

87. 228 Iowa 519, 292 N.W. 148 (1940).

88. For some aspects of chemical tests to determine drunkenness, see note 4, Wyo. L.J. 103.

89. 168 U.S. 532, 533, 18 S.Ct. 183, 192, 42 L.Ed. 568 (1897).

90. 105 Utah 332, 142 P.2d 178, 188 et Seq. (1943).

In *Kelly v. State* (1882) 72 Ala. 244, saying to the prisoner: "You have got your foot in it, and somebody else was with you. Now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth!" In *People v. Barrie*, 49 Cal. 342, saying to the accused: "It will be better for you to make a full disclosure. . . ." In *Green v. State* (1891) 88 Ga. 516, 15 S.E. 10, saying to the accused: "Edmund, if you know anything, it may be best for you to tell it"; or, "Edmund, if you know anything, go and tell it, and it may be best for you. . . ." In *Vaughan v. Comm.* (1867) 17 Gratt., Va., 576, saying to the accused: "You had as well tell all about it."

In *State v. Jones*,⁹¹ a Wyoming case where the defendant was charged with killing her husband, it was held that a statement to the county and prosecuting attorney was inadmissible because the prosecuting attorney had falsely told the defendant that her sister and three others disputed her word, and that her husband was all right, and that he thought it would go easy on her if she told the truth.

VI. SUMMARY AND CONCLUSIONS

Evidence illegally seized was admissible, at common law, in a criminal prosecution. In 1914, the United States Supreme Court held that such evidence obtained through illegal search and seizure by federal officers was inadmissible in a federal prosecution. Since that time the view has gained support, and the trend is in that direction. The majority of states still follow the common law doctrine, under which such evidence is admissible, but their ranks are diminishing. Today, twenty-seven states favor the common law to twenty-one favoring the federal view.

Since the federal courts already exclude evidence illegally obtained by federal officers, it would be but a short step to exclude all illegally obtained evidence whether by federal or by state officers. This result may be reached in the not-too-distant future.

The principal argument advanced in support of the exclusionary rule is that it has a specific purpose in furnishing a needed deterrent to illegal search not otherwise provided for.⁹² But the United States Supreme Court not long ago observed that the rule has not seemed to cut down on the number of illegal searches.⁹³ The alternative method of providing the needed deterrent would be to directly punish the offending officers. One writer has suggested that this is also ineffective since:

The court will receive the fruits of his unlawful acts, will do no more than denounce and threaten him with jail or the penitentiary and at the same time, with tongue in its cheek, give him to understand how fearful a thing it is to violate the Constitution.⁹⁴

91. 73 Wyo. 122, 276 P.2d 445 (1954).

92. *Byars v. United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927).

93. *Irving v. United States*, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561 (1954).

94. Connor Hall, Evidence and the Fourth Amendment, 8 American Bar Association Journal, 646, 647 (1922).

It is a strange method of enforcing the law to say that an officer has broken the law, and that we will punish him by excusing another wrongdoer. This makes society the ultimate loser. It would seem that a better way to safeguard our constitutional rights would be to provide adequate sanctions against the officer or official who obtains the evidence through unlawful means, and trust that the courts which administer the law are of such caliber that they will no more be inclined to turn their heads at a violation of this kind than any other violation of the laws of the country.

HAROLD E. MEIER

THE ASSESSMENT AND COLLECTION OF THE COSTS OF A CRIMINAL PROSECUTION IN WYOMING

Several states, including Wyoming, have enacted statutes which allow the court to assess certain costs in a criminal prosecution if the defendant is found guilty. At common law, costs as such were unknown in criminal cases,¹ therefore the basis for such assessment is statutory, and there can be no liability for costs of prosecution in the absence of such authorization.²

A number of jurisdictions have advanced reasons why the costs of prosecution should be assessed against the guilty party. An Arkansas Court pointed out that the imposition of these costs is not intended as part of the punishment, but it is a means of forcing the guilty to bear the expense of their prosecution, rather than forcing the county or state to bear such expense.³ The Wyoming Supreme Court apparently agrees with the Arkansas Court, for it said in *Arnold v. State*:⁴

If we concede as we are inclined to do, that there is merit in the philosophy that a convicted criminal should not be completely relieved from paying certain items of the overall expense incident to his being successfully prosecuted, that is a matter for legislative rather than judicial determination. . . .

At an earlier day Justice Stone of the Alabama Court took a somewhat different view. He compared the liability for costs with such duties as serving on a jury or posse.⁵

There are two statutes in the State of Wyoming governing the assess-

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1. *Saunders v. People*, 63 Colo. 241, 165 Pac. 781 (1917); *Jenkins v. State*, 22 Wyo. 34, 134 Pac. 260 (1913), reh. denied, 135 Pac. 749.
 2. *State v. Reed*, 65 Mont. 51, 210 Pac. 756 (1922).
 3. *Edwards v. State*, 12 Ark. 122 (1850).
 4. _____ Wyo. _____, 306 P.2d 368, 377 (1957).
 5. *Lee v. State*, 75 Ala. 29 (1883). "Certain duties are cast on all citizens for the welfare of society; to serve on juries, to work the public roads, to testify as witnesses, to act as a posse comitatus, when thereto lawfully summoned, and when a citizen, by his own misconduct, expose himself to the punitive powers of the law, the expense incident to his prosecution and conviction, each and all of these may result in subjecting the defaulter to a money liability."